

EXHIBIT D

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

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CERTIFIED TRANSCRIPT

4 VIVA CAPITAL 3, L.P.,

5 PLAINTIFFS,

6 V.

No. 22-CIV-01911

7 JERRY GARRETT,

8 DEFENDANT.

9 _____/

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11 REPORTER'S TRANSCRIPT OF PROCEEDINGS
12 BEFORE: HONORABLE ROBERT D. FOILES, JUDGE
13 DEPARTMENT 21
14 FEBRUARY 17, 2023
15

16 A P P E A R A N C E S:

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26 REPORTED BY: VALERIE J. CATHEY, CSR 9870

P R O C E E D I N G S

February 17, 2023

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THE COURT: Okay. That takes me back to line 7 and that's Viva Capital versus Jerry Garrett.

And if counsel want to step forward.

MR. STAR: Good morning, Your Honor.

MR. DAVIS: Good morning, Your Honor.

THE COURT: Let me get your appearances, please.

MR. STAR: Certainly.

MR. DAVIS: Harry Davis from the law firm of Schulte Roth & Zabel on behalf of Plaintiffs, Viva Capital 3, L.P., which is also a cross-complaint defendant as well as on behalf of cross-complaint defendant U.S. Bank, National Association.

THE COURT: All right.

MR. STAR: And good morning, Your Honor, Greg Star of Cozen O'Connor appearing also on behalf of the defendant and counter-claim plaintiff, The Estate of Frank Garrett.

THE COURT: All right. Thank you.

And I take it, Mr. Star, S-t-a-r-r?

MR. STAR: One "r."

THE COURT: One "r." And you wish to be heard, right?

MR. STAR: Yes, please.

THE COURT: Go ahead.

MR. STAR: Thank you. So, Your Honor, we obviously agree with the portion of your tentative ruling that concludes

1 that there is no applicable Delaware statute of limitations on
2 the Estate's claim in this case. Our claim arises under
3 Delaware's insurable interest statute section 2704(b), and
4 Your Honor is correct to conclude that there is no applicable
5 statute of limitations in Delaware.

6 Respectfully, I think that's where this analysis should
7 have ended, and here's why, because the question of the
8 application of California borrowing statute, which is California
9 Civil Code 361 as explained by the Supreme Court of California
10 in the McCann case turns on the opposite set of facts than what
11 we have here for two reasons.

12 The plain language, Your Honor, of section 361 of the
13 California Civil Code, I'll paraphrase because the Code's a
14 little lengthy to read. When a cause of action has arisen in
15 another state, and we couldn't maintain the action in that other
16 state, in other words, here we have a cause of action that
17 arises under the law of Delaware, if we were time-barred in
18 Delaware, then the borrowing statute, section 361, would
19 ordinarily say we're time-barred from serving that same claim
20 here in California except if you're a resident of California,
21 California would provide essentially a longer statute of
22 limitations.

23 The facts of the McCann case, Your Honor, explain that
24 that's what that statute's for. The statute's meant to prevent
25 forum shopping. It's meant to prevent a plaintiff who would be
26 barred in the other forum from stating a claim in California

1 that would otherwise be time-barred in the other jurisdiction.

2 McCann tracks were this --

3 THE COURT: What's the cite on the McCann case?

4 MR. STAR: The cite on the McCann case, Your Honor, is
5 225 P.3d 516, and that's the California Supreme Court from 2010.

6 THE COURT: Do you have a better cite? That's not an
7 official cite. Pacific is not a citation. That's the
8 alternative cite. Cal cites.

9 MR. STAR: I can get it for you. I have the Cal
10 cites, 48 Cal.4th 68.

11 THE COURT: Thank you.

12 MR. STAR: Sure. But again it's the California
13 Supreme Court in 2010. The facts of McCann were this,
14 Your Honor, a plaintiff who was a resident of Oklahoma suffered
15 from mesothelioma from asbestos exposure. He had moved to
16 California before he filed a claim. He filed a claim in
17 California state court under Oklahoma law. That's where he was
18 injured. The defendant moved under the Oklahoma statute of
19 limitations which barred his claim. His injury had occurred
20 some 50 years before he filed his claim. And the question
21 McCann presented with, presented with was does the California
22 court need to apply that Oklahoma statute that would bar that
23 plaintiff's claim or can it apply the longer California statute
24 of limitations in the context where California had enacted
25 legislation that would save this man's claim. And that's when
26 you get into this 361 governmental interest analysis.

1 In other words, we don't have that here. We have a
2 situation Your Honor correctly found that our Delaware cause of
3 action is not time-barred. If we brought this claim in
4 Delaware, which incidentally we could do right now, Viva admits
5 that it is a Delaware limited partnership, Your Honor. It's
6 subject to personal jurisdiction in Delaware. It can be sued
7 every day of the week in Delaware state court. Your Honor's
8 ruling that there is no Delaware statute of limitations that
9 will allow us to bring that claim against Viva right now today
10 in Delaware state court. And, so, respectfully, that's where
11 this analysis should stop. Now, once you found that there's no
12 Delaware statute of limitations, there was no need to go to the
13 361 McCann analysis. It actually turns that whole analysis sort
14 of upside down in this case.

15 Even though, pardon me, even if you went to the McCann 361
16 analysis we'd be looking at governmental interests. The
17 Delaware Supreme Court, Your Honor, in successive unbound
18 unanimous opinions has spoken on the public policy Delaware
19 connections in STOLI. The court had made clear that STOLI is
20 not just abhorrent to public policy, it's not just a fraud on
21 courts, but it is a violation of Delaware's constitution.
22 Therefore, it's sui generis in Delaware. It's unique under the
23 law. It's unlike anything else, said the court, the Delaware
24 Supreme Court can monopolize.

25 That means we have an overarching Delaware public policy
26 that no one actually disputes. So we were going to do the

1 governmental interest analysis, which I don't think we should
2 get to here, but if we were going to do that analysis the final
3 factor of that analysis, all of them, actually, would point to
4 the application of Delaware section statute of limitation which
5 Your Honor correctly found there is none. And that's because,
6 Your Honor, that's true for several reasons.

7 Number one, it's the overarching Delaware public policy.
8 This is an affirmative defense that our friends are raising. An
9 affirmative defense anywhere in the country assumes that the
10 facts that are plead in our complaint in our counterclaim are
11 true. Here that means this is an illegal human life wagering
12 policy, it was a Delaware illegal human life wagering policy,
13 and the policy itself and the payment of proceeds violated the
14 constitution.

15 The Mountain case, Your Honor, the Delaware Supreme Court
16 said very clearly that when an entity like Viva or US Bank
17 receives the proceeds of a STOLI policy that entity itself upon
18 receipt of those proceeds is in violation of Delaware's
19 constitution.

20 So we have an overarching Delaware public policy that if
21 you're going to do a general, pardon me, a governmental interest
22 analysis must control. Because if you just suppose that with
23 California's public policy, there's nothing in the public policy
24 of California that's in favor of the STOLI policies. And
25 there's certainly nothing that the general, that the legislature
26 in California has done through its statute of limitations, for

1 example, to override the Delaware constitution. I don't think
2 that would even be possible.

3 Another point. Even if you went through all of that and
4 you still found that California statute of limitation applies,
5 respectfully, can't be the one that applied here for a one-year
6 limitation for penalty and forfeitures. That's true for a
7 number of reasons.

8 First off, the statute itself, that statute, that one-year
9 statute obviously doesn't have anything to do with the kind of
10 claim we have. In the Mountain case, the Delaware Supreme Court
11 said that the 2704(b) claim is, quote, the remedy for violations
12 of the insurable interest requirement. The quote is the remedy
13 for violations of the insurable interest requirement is set
14 forth in section 2704(b).

15 That claim, the Mountain court says is sui generis and,
16 respectfully, it's not correct. This is a general perspective.
17 Pigeonhole that claim to a one-year statute of limitations that
18 applies to California penalties and California forfeitures.

19 Secondly, the penalty and forfeitures statute by plain
20 terms says it applied to claims brought by individuals for the
21 state of California. Well, we have neither of those. We're not
22 the state of California and we're not an individual. We are an
23 estate that has been created like any other sort of entity as a
24 legal fixture, right, like a corporation, a partnership, etc.,
25 and an estate is not an individual. Under the plain terms of
26 the one-year statute Your Honor applied, it can't work here.

1 In fact, our friends at the very beginning of this case
2 pointed out that Jerry Garrett, the son of Frank Garrett, had
3 not yet formally been appointed as the executor of the estate,
4 and therefore they actually argued that Mr. Garrett,
5 Jerry Garrett lacked standing in his individual capacity to
6 bring a claim. They can't say that on the one hand, and then on
7 the other hand say that we're subject to a one-year statute of
8 limitations that only applies to claims brought by individuals.
9 There's more, though.

10 Now Your Honor found that our claim is akin to one for a
11 forfeiture which you described, quoting California law
12 generically, that a forfeiture is the loss of a right, privilege
13 or property. Malkin, the Delaware Supreme Court, Your Honor, in
14 Malkin says STOLI proceeds are no one's property. That was the
15 question that was directly addressed by the Delaware Supreme
16 Court. They came out and they said, quote, no one can have a
17 property interest in a STOLI policy or its proceeds. It was for
18 that exact reason that the Delaware Supreme Court rejected a UCC
19 defense which was based on the idea that there was a property
20 interest in STOLI proceeds. So this cannot be a forfeiture.

21 I think our friends will argue as well that this could
22 possibly be deemed a penalty, but it can't be deemed a penalty
23 either. A penalty, Your Honor, is one that's imposed without
24 any discretion at all. There's no question as to amount.

25 Here, 2704(b), the applicable statute says the death
26 benefits are owed to our clients. Well, that's different in

1 every case. Point number one.

2 Point number two, the Malkin, Supreme Court, the
3 discrepancy in Malkin made it clear. A defendant on a STOLI
4 case like this, like Viva or US Bank, can seek to offset, if
5 appropriate, premium payments that it made. And our friends
6 will do that. In fact, they've done it in every other case
7 we've litigated with them. So they will dispute very clearly
8 the amount that our client is entitled to here, by among other
9 things, disputing whether they get to offset some or all of
10 premiums that were paid, so this cannot possibly be couched as a
11 penalty.

12 The last point, Your Honor, even if you're stuck with the
13 application of a California statute of limitations, which again
14 we don't think is proper, it can't be this one-year statute of
15 limitations for all the reasons I've just said. The only thing
16 it could possibly be is the catch-all four-year statute of
17 limitations, and here we're clearly time limited to that.

18 I do want to step back, though, and make a broader point as
19 to why we're even here. We're only here because of shenanigans.
20 That's true. We, on behalf of our client, attempted for many
21 months to identify who got this money. We wrote to US Bank.
22 They wouldn't tell us. They wouldn't tell Mr. Garrett's wife.
23 They wouldn't tell anybody who got the proceeds. We sued them
24 in Connecticut. We sued their agent, ITM. We sued John Doe's,
25 which is appropriate. They hid it. On the very last day I
26 believe it was before they needed to file a responsive pleading

1 in Connecticut, out of nowhere we learned of Viva's existence
2 with regard to -- for the first time when they filed this case
3 and served it on us.

4 And what they've done here, Your Honor, is tried to use the
5 guise of a declaratory judgment claim telling you that there's
6 an actual case in controversy between them and my client on the
7 merits, yet turned around and say, oh, gotcha. We're going to
8 snap a string and we're going to say even though we just told
9 Judge Foiles that there's a case in controversy, there's really
10 not. Really the Estate's claim is time-barred they say. Well,
11 look, that is not how you get to use the statute of limitations.
12 The reality is all of these issues are timely in front of the
13 court in Connecticut.

14 Based on Your Honor's correct ruling that there is no
15 Delaware statute of limitations, I can turn around again today
16 and sue Viva and Delaware state court. They won't be able to
17 raise the statute of limitations argument. Your order on that
18 is res judicata from following that to litigate this issue, and
19 we'll go ahead there. So all of that is to say, Your Honor,
20 that I think the application of the California statute of
21 limitations is wrong.

22 THE COURT: Okay.

23 MR. STAR: And Your Honor could go back and stay this
24 case -- in other litigation.

25 THE COURT: All right. Thank you.

26 And, Mr. Davis, go ahead.

1 MR. DAVIS: Thank you, Your Honor. Your Honor, we
2 appreciate the thoughtful consideration that you've given to all
3 of the arguments. I know we've thrown a lot of arguments at
4 Your Honor and multiple different rounds of briefing and
5 Your Honor has carefully considered all the arguments, including
6 everything that Mr. Star has said today which has been the
7 subject of briefing. And while, Your Honor, we don't
8 necessarily agree with all of Your Honor's reasoning and all of
9 Your Honor's conclusions, we recognize that Your Honor
10 considered all of our arguments thoughtfully and therefore we
11 accept the tentative.

12 Turning to the point that Mr. Star made, you first start
13 out with the issue on a twist of law analysis of what are the
14 interests of the various states. And Your Honor quite correctly
15 started out with that point and recognized that California has a
16 very strong interest in the application of its own statute of
17 limitations precisely because statutes of limitations are
18 intended to protect the parties and not just the parties.
19 Protecting the parties is one aspect of statutes of limitations,
20 but protecting the party is another. And the party in the
21 Deutsch v. Turner Corporations case which we cited explains that
22 very point and it says, quote, Where the conflict concerns a
23 statute of limitations the governmental interest approach
24 generally leads California courts to apply California law, close
25 quote. Which is exactly what Your Honor held in the tentative.

26 The court then goes on to say, quote, And especially so

1 where California statute would bar a claim California's interest
2 in applying its own law is strongest when its statute of
3 limitations is shorter than that of the foreign state because a
4 quote, state, has a substantial interest in preventing the
5 prosecution in its courts of claims which it deems to be stale,
6 close internal quote.

7 Hence, subject to rare exceptions, the forum will dismiss a
8 claim that is barred by its statute of limitations, period,
9 close quote, citing the Restatement section of Conflict of Laws,
10 section 142, comment F, which is exactly the analysis that
11 Your Honor applied here.

12 And in point of fact there are very clear and palpable
13 connections between this dispute and the state of California.
14 First and foremost as Your Honor recognized in the tentative,
15 only this court will be burdened with having to litigate this
16 case which is based upon events that happened in 2006 and 2008
17 when Mr. Garrett took out this policy. If my friends are right,
18 the Delaware substantive law applies, which we're not here to
19 discuss today, but if they're right that Delaware's substantive
20 law applies, this court will be burdened dealing with the
21 purposes for which Mr. Garrett took out an insurance policy in
22 2006 and his rationale for relinquishing that policy in 2008.
23 And it is a unique burden that will fall on this court, which is
24 precisely why Your Honor's reasoning is correct that California
25 would normally follow, apply its own statute of limitations.

26 Now my friend, Mr. Star, said repeatedly that this court

1 held that there's no statute of limitations in Delaware for
2 2704(b) actions. That is precisely wrong. Your Honor held
3 exactly the opposite, and I'll read from Your Honor's tentative
4 at the bottom of page 2 of the tentative.

5 Quote, Estate argues that this claim is not subject to any
6 statute of limitations, but its arguments lack support that is
7 on point. Both cases, paren, Price Dawe and Malkin, close
8 paren, were based on the premise that STOLI policies violate
9 Delaware constitutional public policy. Estate likens the
10 incontestability clause in Price Dawe as serving quote, the same
11 function, close quote, as the statute of limitations. Nothing
12 in either case suggests that the claim under 18 Delaware's state
13 section 2704 is not subject to any statute of limitations,
14 period, close quote.

15 Your Honor's rejected precisely the linchpin of Mr. Star's
16 argument that there's no statute of limitations applicable to
17 these claims, and indeed neither the Price Dawe case, nor the
18 Malkin case, nor the Berland case, which is third of the
19 Delaware Supreme Court cases that the Estate relies upon for
20 this argument that Delaware has held there's no statute of
21 limitations, none of those cases deal with statute of
22 limitations. Price Dawe dealt with the incontestability clause
23 in the contract, and what the court said is because the contract
24 is void, the incontestability provision in that contract itself
25 never came into being. Says nothing about whether there's a
26 statute of limitations for a case brought by an insurance

1 carrier let alone by an estate.

2 Malkin, Mr. Star had argued in Malkin that the Delaware's
3 enactment of 2704(b) rendered all affirmative defenses and
4 claims improper. But the Delaware Supreme Court in Malkin
5 precisely rejected Mr. Star's argument. What the court in
6 Malkin has said, and I'm quoting from the name of the case, we
7 call it Malkin, Your Honor, but the name of the case is
8 Wells Fargo Bank, N.A. v. The Estate of Phyllis Malkin. The
9 cite is 278 A.3d 53. It's the Delaware Supreme Court and I am
10 quoting from page 62 of the Official Reporter.

11 The court said in doing an analysis as to whether 2704(b)
12 preempts defense and counterclaims, the court said, quote,
13 Finally, 2704(b) is not inconsistent with all common law
14 defenses or counterclaims that a downstream purchaser of a
15 policy might assert against an estate.

16 Continuing two sentences later talks about a specific
17 example not relevant to this case. It then says, quote, In the
18 absence of express statutory language to the contrary a statute
19 conferring a cause of action on one party does not supercede
20 common law defenses or counterclaims that the other party might
21 assert, rather courts must look to the elements of the common
22 law defenses or counterclaims asserted, and where appropriate,
23 the public policy underlying the ban on human life wavering to
24 decide the viability of such defenses or counterclaims to an
25 estate action under 2704(b), close quote.

26 So the Delaware Supreme Court isn't even talking about

1 statutes of limitations and it rejects the argument that somehow
2 this is a magical claim for which there are no defenses.

3 There's similar, there's language in the Berland case that is
4 also helpful on this point.

5 Moving to the borrowing statute argument, the purpose, as
6 Mr. Star just explained of the borrowing statute is if a cause
7 of action arises in a foreign jurisdiction that would be barred
8 under the foreign jurisdiction's law, California will apply a
9 government's interest analysis if the California statute of
10 limitations is longer. And it may apply the longer California
11 statute of limitations if there's a plaintiff from California,
12 but the default will be to apply the shorter foreign statute of
13 limitations.

14 Mr. Star's trying to do exactly the reverse here. A
15 California plaintiff is seeking to apply a longer foreign
16 statute of limitations in derogation of a California statute of
17 limitations that is intended to protect the ports, among other
18 things, and therefore that borrowing statute has absolute,
19 absolutely no applicability, pardon me, no applicability here.

20 Turning to Mr. Garrett's appointment as Special
21 Administrator on behalf of the Estate, the logical underpinnings
22 of Mr. Star's argument is because Mr. Garrett, who controlled
23 whether or not he would apply to be appointed, and when he would
24 do that is allowed to vitiate statutes of limitations.

25 Carry to its logical extreme, Mr. Star's argument is if
26 Jerry Garrett delayed for five years, ten years or a hundred

1 years being appointed Special Administrator of the Estate, then
2 the claim is timely. Clearly, that is not the purpose of
3 statutes of limitations.

4 Now under the California statute of limitations that
5 Your Honor correctly applied, which is 330(a), the one-year
6 statute of limitations, my friend argues this is neither a
7 forfeiture, nor is it a penalty. And we submit that it is
8 actually both and that Your Honor properly explained why it is a
9 forfeiture. It's a forfeiture, the Court's reliance on the
10 Goehring v. Chapman University's case is spot-on because in
11 Goehring what the Court said is that a forfeiture is the
12 divestiture of property without compensation. Your Honor quotes
13 that. That's exactly what the Estate's effort to recover
14 21 million dollars in this case that has been paid to my client
15 is. They're trying to obtain property without any compensation
16 for it. Not as damages. They don't say we've been damaged.
17 They don't say we've been harmed. They don't say we've, that
18 the damage that we suffered is 21 million dollars. They say
19 you've received 21 million dollars. We want it. Give it to us.
20 That is a forfeiture and that is a penalty.

21 And with respect to the one argument Mr. Star made today,
22 which is not in his papers, is that the statute only applies to
23 individuals in the Estate and the Estate is neither. The cases
24 we relied upon under 330(a) don't involve individuals. They
25 involve corporate entities.

26 Eisenberg Village v. Suffolk Construction involved a

1 village, a community that was suing a contractor who was
2 unlicensed and trying to keep the benefit of the contractor's
3 work without having to pay him on the theory he was unlicensed
4 and the statute gave him a right to recover that. And the court
5 said, well, that's a penalty because it's got no relationship to
6 your damages. It simply is providing you with a windfall.

7 Mr. Star also makes, repeats this case or controversy
8 argument. He says, well, gee, Viva comes running into this
9 court saying there's a concrete dispute for this court to
10 adjudicate and at the same time says that the Estate's
11 cross-complaint is barred by the statute of limitations. The
12 way he argues it in his brief he says you are using offensively
13 a statute of limitations that can only be used defensively.

14 Respectfully, that's not so, Your Honor. We are using the
15 statute of limitations to defend ourselves against a
16 cross-complaint that is untimely under California law. And the
17 reason we plead that there's a concrete controversy is because
18 Mr. Stars's client at his acknowledgment granted the three
19 federal courts simultaneously, sued the wrong party,
20 ITM TwentyFirst, that never received a penny of this death
21 benefit, sought desperately to get the identity of the
22 beneficial owner. We will get when we deal with tolling whether
23 that gives rise to tolling in substance, but tried to get the
24 identity and told the courts around the country I intend to sue
25 that beneficial, that beneficial owner. So there was a concrete
26 controversy for this court to adjudicate. We didn't say it was

1 a meritorious controversy. We didn't say it was not
2 time-barred. We said there was a controversy. There was an
3 eminent threat of litigation.

4 Now the final point Mr. Star makes is he talks about
5 they're trying to get information on who the beneficial owner is
6 and his description, his label of shenanigans. Your Honor is
7 not dismissing without leave to amend. Your Honor's tentative
8 gives them an opportunity to try and plead some viable basis for
9 tolling, so we'll get to the facts and the law related to
10 tolling if they're able to successfully amend their complaint.
11 But that's not really for today, Your Honor. Suffice it to say,
12 Your Honor already denied their motion for a stay, should reject
13 Mr. Star's oral motion for reconsideration and should stick to
14 the tentative, Your Honor.

15 THE COURT: All right. Thank you.

16 I'll hear from you in a minute, Mr. Star, but I'm going to
17 say this, my goal here is to seek fair play and substantial
18 justice and my ruling concerned me this evening, or last evening
19 when I put it out because it seems unjust and somewhat draconian
20 to apply the one-year statute.

21 I tend to agree with you, Mr. Star, in your comments today,
22 to me it seems like an injustice to preclude the defendant from
23 litigating the matter in light of the allegations under STOLI,
24 thus, the Court intends to apply the Delaware law under 2704(b)
25 and that there is no statute of limitations under the Delaware
26 law. Your oral request for reconsideration I think is not going

1 to be taken as such, instead the Court will do it on its own and
2 therefore stay the matter and pending further proceedings in the
3 Delaware court. That's my intent.

4 MR. STAR: Thank you. I have nothing further to add
5 then.

6 MR. DAVIS: I would just add, Your Honor, there is no
7 proceeding in the Delaware court.

8 THE COURT: Well, then I'm going to stay the
9 proceeding pending other proceedings because at this point that
10 will be my ruling. All right.

11 MR. DAVIS: Thank you, Your Honor.

12 MR. STAR: Thank you, Your Honor.

13 THE COURT: Have a good day. Thank you.

14 (Proceedings concluded in this matter.)
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1 STATE OF CALIFORNIA)

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3 COUNTY OF SAN MATEO)

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8 I, Valerie J. Cathey, Official Reporter of the Superior
9 Court of the State of California, County of San Mateo, do hereby
10 certify that the foregoing pages, inclusive, comprise a full,
11 true, and correct computer-aided transcription of the
12 proceedings held on February 17, 2023, in the matter of the
13 above-entitled cause.

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16 DATED: May 17, 2023
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21 *Valerie J. Cathey*
22 _____

23 VALERIE J. CATHEY, CSR 9870
24 OFFICIAL REPORTER, SUPERIOR COURT
25
26